No. 92-1482

In the Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS AND ERNESTO HERNANDEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have a fixed term of office.

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OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Weiss, Pet. App. 1a-85a, is reported at 36 M.J. 224. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 86a-87a, is unreported. The order of the Court of Military Appeals in the case of petitioner Hernandez, Pet. App. 88a, is not yet reported. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 89a-91a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Weiss* was entered on December

21, 1992. The judgment of the Court of Military Appeals in *United States* v. *Hernandez* was entered on February 25, 1993. The petition for a writ of certiorari in both cases was filed as a joint petition on March 12, 1993, and was granted on May 24, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1259(3) (Supp. III 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, provides as follows:

> [The President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The Due Process Clause of the Fifth Amendment provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

STATEMENT

1. The military criminal justice system conducts three types of criminal proceedings, known as courts-martial. The summary court-martial, which is designed to adjudicate only minor offenses, is limited to enlisted servicemembers and can be conducted only with their consent. A single commissioned officer

presides over a summary court-martial, and he can impose up to one month's confinement and related punishments. Arts. 16(3), 20, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816(3), 820; see also *Middendorf* v. *Henry*, 425 U.S. 25 (1976).

At the next level is the special court-martial. It normally consists of a military judge and at least three members, although the accused may elect to be tried by a military judge alone. Art. 16(2), UCMJ, 10 U.S.C. 816(2).[1] A special court-martial has jurisdiction over most offenses under the UCMJ, but the maximum punishment that it can impose is limited by statute to confinement for six months, a bad conduct discharge, forfeiture of two-thirds pay per month for six months, and a reduction in rank. Art. 19, UCMJ, 10 U.S.C. 819.

A general court-martial is composed of either a military judge and not less than five members, or a military judge alone if the defendant so requests. Art. 16(1), UCMJ, 10 U.S.C. 816(1). A general court-martial may try all offenses defined by the UCMJ and may impose any punishment authorized by the Code. Art. 18, UCMJ, 10 U.S.C. 818.

The military judge at a special or general court-martial acts as the presiding officer. He conducts pretrial sessions at which a defendant is arraigned and pleas are entered; he rules on all legal questions; and he instructs the members on the laws and procedures to be followed in the case. Rule for Courts-Martial 801(a), *Manual for Courts-Martial*,

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[1] Although Article 16(2) allows court-martial members to sit without a military judge at a special court-martial, in practice military judges are almost always detailed to such cases.

United States—1984 (*Manual*). When a military judge presides over a court-martial composed of panel members, the members decide guilt or innocence and, when necessary, impose sentence. Rules for Courts-Martial 921, 1006. When a military judge sits alone, he decides those issues. Art. 16, UCMJ, 10 U.S.C. 816. The sentence imposed by any type of court-martial does not become final until it is approved by the officer who convened the court-martial. Art. 60, UCMJ, 10 U.S.C. 860.[2]

All cases in which the sentence approved by the convening authority extends to death, confinement in excess of one year, dismissal of a commissioned officer, or a punitive discharge in the case of enlisted servicemembers, are forwarded to the courts of military review. Art. 66, UCMJ, 10 U.S.C. 866. The members of those courts are assigned to that duty by the Judge Advocate General of each service.[3]

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[2] The convening authority is a commander authorized to convene courts-martial under Articles 22-24, UCMJ, 10 U.S.C. 822-824, and Rule for Courts-Martial 504. The duties of the convening authority include selection and appointment of court-martial panel members (commonly known as "detailing" the members); determination and direction that the accused be brought to trial by the court-martial for the charged offenses (commonly known as "referral" of the charges); and post-trial review of the proceedings to approve the sentence or to grant clemency (commonly known as "action" on the case). See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860; see also Rules for Courts-Martial 503, 601, 1107.

[3] The Judge Advocate General of each service is the principal legal officer for that service. 10 U.S.C. 3037 (Army), 5148 (Navy-Marine Corps), 8037 (Air Force). The General Counsel of the Department of Transportation serves as the Judge Advocate General for the Coast Guard. Art. 1(1), UCMJ, 10 U.S.C. 801(1). Military attorneys serving under the authority of the Judge Advocate General of each service are referred to as judge advocates.

The courts of military review exercise fact-finding powers and may disapprove court-martial findings and sentences. *Ibid.* After review by the court of military review, a court-martial case is subject to review by the Court of Military Appeals, a five-member civilian court whose judges are appointed by the President to statutorily fixed terms of office. Arts. 67, 142, UCMJ, 10 U.S.C. 867, 942 (Supp. IV 1992).

2. Petitioner Weiss, a member of the United States Marine Corps, pleaded guilty at a special court-martial to one count of larceny, in violation of Article 121, UCMJ, 10 U.S.C. 921. He was sentenced to three months' confinement, to partial forfeiture of pay for three months, and to a bad-conduct discharge. Petitioner Hernandez, also a member of the Marine Corps, pleaded guilty to smuggling 11 kilograms of cocaine into this country from Colombia aboard military aircraft, in violation of Article 112a, UCMJ, 10 U.S.C. 912a, and conspiracy, in violation of Article 81, UCMJ, 10 U.S.C. 881. He was sentenced to 25 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved Hernandez's sentence as adjudged, but suspended all confinement in excess of 20 years in accordance with a pretrial agreement.

The Navy-Marine Corps Court of Military Review affirmed petitioners' convictions. Pet. App. 86a-87a, 89a-91a. In the case of petitioner Weiss, the Court of Military Appeals granted plenary review to address his claims and affirmed. Pet. App. 1a-85a.

Relying on its decision in *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), petition for cert. pending, No. 92-1102, the court, without dissent, held that due process does not require military judges to have a fixed term of office. Pet. App. 2a n.1. The court also rejected petitioners' Appointments Clause challenges to the judges on the trial courts and the court of military review. *Id.* at 3a-35a. Judges Gierke and Cox concluded that the duties of a judge in the military justice system are germane to the duties that military officers already discharge and that the assignment of an officer to judicial duties therefore does not require a new appointment. *Id.* at 8a-19a. Judge Crawford concurred in the result on the ground that the Appointments Clause does not apply to the military. *Id.* at 22a-35a. Chief Judge Sullivan and Judge Wiss dissented separately. *Id.* at 36a-71a, 72a-85a.

In the case of petitioner Hernandez, the Court of Military Appeals summarily affirmed on the basis of its decision in *United States* v. *Weiss*. Pet. App. 88a.

SUMMARY OF ARGUMENT

I. The Appointments Clause does not bar Congress from authorizing the Judge Advocates General to assign commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review. Since military judges are officers of the United States appointed by the President with the advice and consent of the Senate, an additional appointment to act as a military judge is unnecessary if the duties they undertake in that role are "germane" to ones they already possess. *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893). The germaneness test is easily satisfied here, because all

military officers play integral roles in the administration of the military justice system, which is indispensable to maintaining good order and discipline within the services. Service as a military judge is an important and specialized form of participation in the military justice system, but it is not so foreign to the other functions performed by commissioned military officers in the military justice system that the Constitution requires a separate appointment under the procedures set out in the Appointments Clause.

If the Judge Advocates General cannot appoint military judges, prior appointments nonetheless should be given effect under the "de facto officer" doctrine. The judges in petitioners' cases were not usurpers, without authority or function; they exercised the power vested in them by statute and by their facially valid assignments. And an adverse decision on this issue would have a devastating effect on the operation of the military justice system, affecting all pending prosecutions and all cases on direct appeal in which the issue has been preserved. Accordingly, if the Court concludes that the present method of appointing military judges is unconstitutional, it should nonetheless give validity to those judges' prior acts and uphold the convictions in these cases under the de facto officer doctrine.

II. Due process does not require that military judges have life tenure or a fixed term of office. The relevant inquiry is whether the absence of tenure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992), and not whether a court

considers tenure a useful reform that would not impose an undue burden on the military.

Under the governing standard, the military system does not deny defendants due process of law. The text of the Constitution grants tenure to specified officers, including federal judges, but it does not grant tenure to military judges or members of other Article I courts. History also does not suggest that tenure is an indispensable aspect of a fair court-martial system. Court-martial judges did not have tenure in England at common law and have never enjoyed tenure in the American military justice system. Moreover, tenure serves no end in itself, but renders a judicial system fairer only if it serves to remedy risks of bias that otherwise would affect the system. The military justice system has been designed to address the risk of judicial bias in other ways, such as ensuring that both the selection and the performance review of judges is done by persons other than those responsible for pressing criminal charges and initiating prosecutions. The Uniform Code of Military Justice and the services' regulations are carefully structured to ensure that military judges are independent and impartial. In light of those guarantees, the absence of tenure does not render the military justice system fundamentally unfair and thus does not violate due process.

ARGUMENT

I. CONGRESS CAN AUTHORIZE THE JUDGE ADVOCATE GENERAL OF EACH SERVICE TO ASSIGN COMMISSIONED OFFICERS TO SERVE AS MILITARY JUDGES

The Appointments Clause, Art. II, § 2, Cl. 2, divides the "Officers of the United States" into two categories. "Principal officers" must be appointed by the President with the advice and consent of the Senate. "Inferior officers" can be appointed in that manner as well, but Congress can vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Morrison* v. *Olson*, 487 U.S. 654, 670 (1988); *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause promotes the separation of powers by preventing one Branch from aggrandizing power at the expense of another and by preventing diffusion of the appointment power. *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2638 (1991); *id.* at 2651-2653 (opinion of Scalia, J.); *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 485-488 (1989) (Kennedy, J., concurring in the judgment).

Petitioners were convicted and sentenced by military officers who had been assigned to serve as military judges. Petitioners' convictions and sentences were sustained by the Navy-Marine Corps Court of Military Review, which also consists of military officers. Each of those judges had been appointed as an officer in the armed forces by the President with the advice and consent of the Senate. They were then assigned to serve as judges in the military justice system by the Navy Judge Advocate General.

Petitioners maintain that the judges in their cases—and in every other case prosecuted in the

military since the UCMJ was amended in 1968—were not authorized to perform the responsibilities of those offices, because they were not appointed as military judges in the manner provided for in the Appointments Clause. Since the Judge Advocates General are neither Courts of Law nor Heads of Departments, petitioners argue that they cannot appoint military judges, even if military judges are regarded as "inferior officers." That argument is mistaken. Assignment of a military officer to serve as a trial or appellate judge is entirely consistent with the Appointments Clause, because those judicial duties are germane to the duties of a military officer.[4]

[4] We agree with petitioners, Br. 14, that military officers must be appointed as officers pursuant to the Appointments Clause; we therefore disagree with Judge Crawford's contrary view, see Pet. App. 22a-35a. As this Court has explained, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Art. II]." *Buckley*, 424 U.S. at 126; *Freytag*, 111 S. Ct. at 2640. That is the case regardless of the power Congress exercises in creating the positions to be filled. *Buckley*, 424 U.S. at 132-137. We also agree with petitioners, Br. 14, that military officers have responsibilities of sufficient importance that they must be considered "Officers of the United States," not merely "employees." See *Wood* v. *United States*, 107 U.S. 414, 417 (1883) (assuming that the Appointments Clause applies to military officers); *Freytag*, 111 S. Ct. at 2640.

We do not agree with petitioners that military judges are "principal officers" of the United States. Like the independent counsel found to be an "inferior officer" in *Morrison*, military judges are subject to removal by a higher Executive Branch official: the Judge Advocate General of each service, Arts. 1(1), 26, 66, UCMJ, 10 U.S.C. 801(1), 826, 866, or the President, acting in his capacity as commander-in-chief. See *Morrison*, 487 U.S. at 671. Moreover, the authority of a military judge does not extend to formulating policy for the Executive Branch or even the military. See *Morrison*, 487 U.S. at 671-672. The characterization of military judges as inferior officers is consistent with the Court's prior decisions on the issue. See *Freytag*, 111 S. Ct. at 2640-2641; *United States* v. *Nixon*, 418 U.S. 683, 696 (1974); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-354 (1931); *United States* v. *Eaton*, 169 U.S. 331, 343-344 (1898); *Ex parte Siebold*, 100 U.S. 371, 379-380, 397-398 (1880). In any event, however, because the persons who served as military judges in this case were all appointed as military officers by the President and confirmed by the Senate, it does not matter to the disposition of this case whether they are considered principal officers or inferior officers.

A. A Military Officer Does Not Need A New Appointment To Serve As A Military Judge Since His Judicial Duties Are Germane To Those He Already Enjoys As A Military Officer

1. *An officer can perform new duties germane to his existing ones without being reappointed to office*

Military officers are officers of the United States appointed by the President with the advice and consent of the Senate. Their appointments as officers are made in accordance with the Appointments Clause, so that unless their assignment as military judges constitutes a new "appointment," for purposes of the Appointments Clause, they need not separately be appointed to those duties under the procedures specified in that Clause. Rather, they may perform their newly assigned duties as long as those duties are germane to the responsibilities they already enjoy in their roles as military officers.

This Court recognized the doctrine of "germaneness" in *Shoemaker* v. *United States*, 147 U.S. 282

(1893). There, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park in the District of Columbia. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers, the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia, also were designated by Congress to serve on the commission. 147 U.S. at 284. Their designation was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that

> the two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held * * * [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Id. at 301. After considering the new responsibilities given to the officers, the Court concluded that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer (In re Certain Complaints Under Investigation)*, 783 F.2d 1488, 1515 (11th Cir.), cert. denied, 477 U.S. 904 (1986).

That rule is a sensible one. It enhances the efficient operation of the Executive Branch by enabling existing officers to perform related duties without having to undergo the cumbersome process of reappointment and face the prospect of interbranch friction every time the officers' duties are modified. And it does not undercut the authority of the Legislative Branch, which can define Executive Branch offices in a way that makes clear when reappointment of officers is necessary and when it is not.

2. *The duties performed by a military judge are germane to his duties as a military officer*

a. The military is in important respects a "specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). It depends on its members—and particularly its officers—to perform a variety of essential tasks that ordinarily would be performed by specialists in the civilian sector. Military officers must be able to master and perform a wide range of jobs and missions, including a variety of tasks inherent in the enforcement of military order and discipline. The vehicle ultimately responsible for enforcing discipline within the command is the military justice system, and both commanders and subordinate officers play integral roles in the operation of that system.

Although military lawyers handle most of the services' legal work, nonlawyer officers play an active role in military legal affairs as well. For more than 200 years Congress has determined that the overriding need for discipline and readiness requires that every officer as a part of his general duties participate in the operation of the military justice system. That fundamental proposition has remained constant in

times of war and peace despite the significant evolution of the military justice system for the past 200 years, and it remains vital in the military justice system even today.

The UCMJ assigns officers a variety of judicial and quasi-judicial functions. Commissioned officers have a duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Commanding officers are authorized to impose "non-judicial punishment[s]," which may include restricting a servicemember's freedom of movement for up to 60 days, and imposing forfeitures of pay and reductions in rank. Art. 15, UCMJ, 10 U.S.C. 815. When an accused is confined pending a court-martial, his commander is required to make a prompt probable cause determination that continued confinement is warranted. Rule for Courts-Martial 305(h)(2). Commanders may also authorize searches for criminal evidence. Mil. R. Evid. 315(d)(1).

Officers also have quasi-judicial duties in connection with post-conviction review. Every officer who convenes a general or special court-martial has the authority to review and modify the court's findings and sentence. Art. 60, UCMJ, 10 U.S.C. 860. Moreover, the clemency power conferred on each service Secretary by Article 74 of the UCMJ, 10 U.S.C. 874, is exercised by clemency and parole boards whose members include officers who are not judge advocates. See Secretary of the Navy Instruction 5815.3G; Air Force Regulation 125-18; Army Regulation 15-130; *Coast Guard Personnel Manual* [COMDTINST M1000.6A].

Any commissioned officer on active duty is qualified to serve as a court-martial member. Art. 25(a),

UCMJ, 10 U.S.C. 825(a). When proceedings are conducted in the absence of a military judge, as can be the case in a special court-martial and is almost always the case in a summary court-martial, the officer or officers conducting the court-martial resolve those issues that would otherwise be handled by the military trial judge. Art. 51, UCMJ, 10 U.S.C. 851.

Commissioned officers may also be appointed as investigating officers empowered to preside over hearings and recommend that charges be referred to trial by general court-martial. Art. 32, UCMJ, 10 U.S.C. 832; Rule for Courts-Martial 405(d)(1).[5] An officer may order that enlisted personnel be confined pending resolution of charges. Art. 9(b), UCMJ, 10 U.S.C. 809(b). And an officer may be appointed as a magistrate to review a commander's decision to order a servicemember into pretrial confinement. Rule for Courts-Martial 305(i)(2).

Commissioned officers also participate in a variety of quasi-judicial roles outside the military justice system. For example, commissioned officers may serve on administrative fact-finding bodies convened to investigate specific incidents.[6] One such tribunal is a

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[5] Officers appointed to Article 32 investigations exercise judicial functions similar to those performed by civilian judges or magistrates at preliminary hearings. *United States* v. *Collins*, 6 M.J. 256, 258-259 (C.M.A. 1979).

[6] See Arts. 135, 139, UCMJ, 10 U.S.C. 935, 939; *Manual of the Judge Advocate General of the Navy* [JAGINST 5800.7C], Ch. 2; *Coast Guard Administrative Investigations Manual* [COMDTINST M5830.1]; Air Force Regulation 120-3 (outlining procedures for investigating boards); Air Force Regulation 11-31 (detailing procedures for appointing a board of officers); Army Regulation 15-6 (appointment of investigating officers and boards of officers).

"court of inquiry." A court of inquiry is authorized to "investigate any matter," and its proceedings are conducted like a formal trial. The court of inquiry decides facts and makes recommendations if required to do so by the convening authority. Art. 135, UCMJ, 10 U.S.C. 935. In addition, a military tribunal is convened whenever a complaint is made to a commanding officer that willful damage has been done to the property of another person or that his property has been taken by members of the armed forces. Art. 139, UCMJ, 10 U.S.C. 939. And certain officers perform quasi-judicial duties to investigate and act on a complaint by a soldier that he has been wronged by his commanding officer. Art. 138, UCMJ, 10 U.S.C. 938. Officers may also serve as recorders representing the government's interest at hearings considering the administrative separation of a servicemember, and they may be appointed to serve as board members at such hearings.[7]

In short, it has always been and continues to be the business of military officers to conduct the adjudicative functions of the armed forces, whether civil, criminal, or disciplinary in nature. Not only does the military regulatory structure anticipate that any qualified commissioned officer may undertake the

[7] See Secretary of the Navy Instruction 1920.6A; *Naval Military Personnel Manual* § 3640350, at 36-52 through 36-56; Marine Corps Order [MCO] P1900.16 (*Marine Corps Separation and Retirement Manual*); *Coast Guard Personnel Manual* [COMDTINST M1000.6A]; Air Force Regulations 11-31, 39-10, 36-2 and Army Regulations 635-100, 635-200 (procedures for separating Air Force and Army officers and enlisted personnel). Officers also can be appointed to Foreign Claims Commissions empowered to adjudicate monetary claims made against the United States by foreign nationals. See, *e.g.*, Army Regulation 27-20; JAGINST 5800.7C, Ch. 8.

functions of a military judge at some point in his military career, but it also anticipates that any commissioned officer—even an officer lacking the qualifications of a military judge—may at some point be called on to perform quasi-judicial functions. Given the nature of the responsibilities inherent in becoming an officer in the armed forces, the duties of a military judge are germane to those of a military officer for Appointments Clause purposes. *Shoemaker*, 147 U.S. at 301.

b. Petitioners argue that the scope and significance of the duties of a military judge requires that those performing those duties be separately appointed to that position. Br. 21-26. But that argument proves far too much. Military officers are called upon to perform a wide variety of tasks—many of which involve life or death decisions for the servicemembers in their command—without the need for constitutional reappointment every time they take on a new and different assignment. The responsibilities of the commander of a division-sized ground force, a bomber wing, or a nuclear ballistic-missile submarine are more significant and more varied than any duty assigned to a military judge. Yet no one would seriously claim that the officers chosen for such widely different and specialized assignments must be separately reappointed to them under the constitutionally prescribed procedure. The result should be no different when commissioned officers are assigned to serve as judges.

The assignment of qualified commissioned officers to serve as military judges (without a second appointment pursuant to the Appointments Clause) is mirrored in the procedures routinely used to delegate most military tasks. Military assignments—particu-

larly temporary assignments—are typically not made by the President, with the advice and consent of the Senate, or even by the Secretary of Defense or the Secretaries of the different services. Compare, *e.g.*, 10 U.S.C. 3065(c) (authorizing members of the Army assigned or appointed to one branch to be detailed for duty with any other branch), with 10 U.S.C. 3283 (authorizing Secretary of the Army to assign and transfer commissioned officers among branches).

Congress has not hesitated to demand a role concerning the appointment of military officers to certain particularly sensitive duties.[8] Congress could have demanded a similar role in the designation of military judges, but instead left their selection to the Judge Advocates General, the officers primarily responsible for implementing the UCMJ, subject to congressionally prescribed standards. Arts. 26, 66, UCMJ, 10 U.S.C. 826, 866.[9] Petitioners thus cannot claim that

[8] See, *e.g.*, 10 U.S.C. 152, 154 (Senate confirmation required for appointment of Chairman and Vice-Chairman of the Joint Chiefs of Staffs); 10 U.S.C. 5033, 5035 (same for Chief and Vice Chief of Naval Operations); 5043, 5044 (same for Commandant and Assistant Commandant of the Marine Corps); 5137 (same for Surgeon General of the Navy); 5141 (same for Chief of Naval Personnel); 5142 (same for Chief of Chaplains); 5148, 5149 (same for Judge Advocate General and Deputy Judge Advocate General of the Navy).

[9] Petitioners suggest that assignment to duty as a military judge is fundamentally different from assignment to other duties because a person appointed as a military judge must satisfy certain congressionally mandated standards above and beyond being an officer. Br. 19. The fact that a particular assignment requires particular qualifications does not ipso facto require that the incumbent be appointed to that office pursuant to Appointments Clause procedures; if that were so, persons assigned to service as trial and appellate counsel pursuant to Articles 27 and 70 of the UCMJ, 10 U.S.C. 827, 870, could not be assigned by the Judge Advocate General, because those persons must satisfy the criteria set forth in Article 27(b)(1) of the UCMJ, 10 U.S.C. 827(b)(1).

they are invoking the Appointments Clause in defense of legislative prerogative.

Petitioners contend that the germaneness theory of *Shoemaker* is inapplicable because Congress has authorized the appointment of civilians to serve as judges on courts of military review. Br. 17. That provision, however, has no relevance to this case, because no civilian has served on the Navy-Marine Corps Court of Military Review during the consideration of petitioners' appeals.[10] The only question presented here is whether the Navy Judge Advocate General has lawfully assigned to the Navy-Marine Corps Court of Military Review officers who constitutionally may exercise authority in that position. *Buckley*, 424 U.S. at 126, 141. As explained above, the persons who

[10] Petitioners note that two civilians sit on the Coast Guard Court of Military Review. As the plurality below pointed out, Congress authorized civilians to serve on the courts of military review to accommodate the manpower needs of the Coast Guard. Pet. App. 19a-20a (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1189 (1949)). The Secretary of Transportation, a "Head of Department" within the meaning of the Appointments Clause, has eliminated any issue as to the validity of those appointments by adopting the appointments previously made by the Department's general counsel. See *United States* v. *Carpenter*, No. 67,757 (C.M.A. Aug. 3, 1993), slip. op. 22 n.1; *United States* v. *Webster*, No. 996 (C.G.C.M.R. May 18, 1993), slip op. 15-16.

served on the trial and appellate benches in this case were military officers lawfully assigned to serve in those capacities.[11]

Finally, petitioners express concern that to uphold the assignment of military officers as military judges on germaneness grounds would lead to absurd results, permitting, for example, a person appointed to serve as United States Attorney for the District of Alaska to be assigned to head the Antitrust Division or a trial attorney at the National Labor Relations Board to serve as an Administrative Law Judge. Br. 23. But our theory has no such implications. Service as a military judge is germane to the responsibilities of military officers because, except where Congress has specifically so provided, military officers are expected to be ready to serve in a wide variety of capacities throughout the military system. The office of military officer is thus a broad one by definition and tradition. The responsibilities of the office of United States Attorney, by contrast, are narrowly confined by statute and regulation, and do not extend to service as the head of the Antitrust Division. Likewise, the responsibilities of a trial attorney with the National Labor

[11] Petitioners try to distinguish *Shoemaker* on other grounds, Br. 17-18, but none is persuasive. For example, petitioners note that the positions challenged in *Shoemaker* were temporary, but that fact played no role in the Court's decision; temporary violations of Article II are violations nonetheless. Petitioners also note that a majority of the commission was validly appointed, but that fact, too, played no role in the Court's decision. Finally, petitioners state that the ruling in *Shoemaker* rested on the need to have flexibility in the operation of government. That proposition supports us, not petitioners.

Relations Board do not extend by statute, regulation, or usage to service as an Administrative Law Judge. On the other hand, if Congress appointed several persons to serve as Assistant Attorneys General without restriction to a particular Division of the Department of Justice, there would be no Appointments Clause violation if those persons were assigned to responsibilities with different Divisions, even if the assignment were made by the Deputy Attorney General, rather than by the President, the Head of a Department, or a Court of Law. Similarly, if the defined responsibilities of trial attorneys at the National Labor Relations Board included occasional service as Administrative Law Judges, that service would be germane for constitutional purposes to their appointment as trial attorneys. Because military officers have responsibilities that, by definition, extend to participation in the military justice system including, for those qualified, service as military judges, their assignments within the military justice system do not require separate appointment under the Appointments Clause.[12]

[12] Petitioners' reliance on *Freytag* v. *Commissioner* to make the contrary argument is misplaced. At issue there was a challenge to a statute creating the United States Tax Court as an Article I court and authorizing the Chief Judge of that court to appoint special trial judges to hear certain proceedings. This Court held that the special trial judges were inferior officers subject to the Appointments Clause; that the Tax Court was a "Court[] of Law" for purposes of that Clause; and that Congress could vest the appointing power in the chief judge of that court. 111 S. Ct. at 2640-2646 *Freytag* did not involve the question whether an officer who has already been properly appointed pursuant to Article II must be reappointed before assuming additional germane duties.

B. If The Present Method Of Assigning Military Judges Violates The Appointments Clause, Petitioners' Convictions Should Be Affirmed Under The De Facto Officer Doctrine

If the Judge Advocates General cannot appoint military judges, prior appointments by those officials should nonetheless be given effect under the "de facto officer" doctrine. Under that doctrine, a "person actually performing the duties of an officer under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945); see also *Buckley*, 424 U.S. at 142-143.[13]

This Court long ago recognized the concept of de facto validity and the de facto officer rationale. *Norton* v. *Shelby County*, 118 U.S. 425 (1886). This Court stated in *Norton* that when an individual claiming a de jure office is in possession of an office that does validly exist, he is performing its duties, and he claims to be such officer under color of election or appointment, that individual is a de facto officer. 118 U.S. at 441-449; see also *Buckley*, 424 U.S. at 142-143 (refusing to invalidate the prior acts of the Federal Election Commission despite ruling that the commissioners were not constitutionally appointed); *Franklin Savings Ass'n* v. *Director, Office of Thrift Supervision*, 934 F.2d 1127, 1149-1150 (10th Cir. 1991), cert. denied, 112 S. Ct. 1475 (1992); *Ryan* v. *Tinsley*, 316 F.2d 430, 431-432 (10th Cir.), cert. denied, 375 U.S. 17 (1963). The de facto officer rationale, which gives validity to acts of officers regardless of any defects in the legality of their appointment or election, "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441.

[13] The dissenting judges below acknowledged that the de facto officer doctrine might be applicable here. Pet. App. 36a, 71a (Sullivan, C.J., dissenting), 85a & n.9 (Wiss, J., dissenting). In a subsequent decision, the Court of Military Appeals has invoked the de facto officer doctrine to uphold the conviction of a member of the Coast Guard whose conviction was reviewed by a panel that included a judge whose appointment the Court of Military Appeals held invalid under the Appointments Clause. *United States* v. *Carpenter*, No. 67,757 (C.M.A. Aug. 3, 1993), slip op. 10.

In this case, both "policy and necessity" favor application of the de facto officer doctrine. *First*, petitioners do not maintain that the present method of appointing military trial and appellate judges had an actual, adverse effect on the outcome of their cases. Instead, their claims are systemic attacks on the structure of the military judiciary. Because petitioners have failed to demonstrate that the current system of appointment has prejudiced their right to receive an impartial trial and appeal, any error should not affect the validity of their convictions. *Second*, unlike the county commissioners in *Norton*, the judges in these cases were not "usurpers," without authority or function. 118 U.S. at 441; *id.* at 441-449. They occupied de jure offices and performed the well-defined functions of those offices. *Third*, because the Court's judgment would be applicable to every pending prosecution in the military system and every direct appeal in which the claim has been properly preserved, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), an adverse decision on this issue would have a devastating effect

on the operation of the military justice system.[14] Invalidating convictions on a ground unrelated to guilt or innocence, where the convictions have been obtained consistent with statutory mandate, would impose an unnecessary hardship on the military services.

Accordingly, should the Court decide that the present method of appointing military judges is unconstitutional, it should nonetheless uphold the convictions in these cases under the de facto officer doctrine. The Court also should stay the effectiveness of its ruling for a reasonable period to give Congress and the Executive an opportunity to develop procedures dures for the appointment of military judges consistent with the Court's mandate. The Court has followed that procedure in similar cases in the past, see *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Buckley*, 424 U.S. at 142-143, and it should do so here.

II. DUE PROCESS DOES NOT REQUIRE THAT MILITARY JUDGES HAVE A FIXED TERM OF OFFICE

Petitioners' second claim is that, regardless of how military trial and appellate judges are appointed, due process requires that they hold their offices for some fixed term in order to ensure that they will act as impartial adjudicators. Br. 26-45. Petitioners, however, can find no support for their claim in the text of the Constitution or in the relevant legal history. Rather, they argue that because the benefits of tenure

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[14] In fiscal year 1991 alone, the service conducted 2610 general courts-martial, and the military appellate courts reviewed 5183 cases. *Annual Report on Military Justice*, 34 M.J. at LVII-CXLIII (1992).

would outweigh its costs, due process requires some kind of judicial tenure in the military justice system.

Petitioners' submission would require this Court to engage in an undirected line-drawing exercise in defining the judicial tenure obligations imposed by the Due Process Clause in the military setting; it ignores this Court's decisions rejecting similar claims of implied bias; and it disregards other safeguards in the military justice system that are designed to ensure that military judges are impartial. More fundamentally, petitioners' claim ignores a basic principle governing this Court's review of legal challenges to military practices and procedures.

As the Court has recognized, Congress and the President are accorded great deference in designing military institutions. *Parker* v. *Levy*, 417 U.S. at 743. Judicial deference "is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981); *id.* at 64-67; *Goldman* v. *Weinberger*, 475 U.S. 503, 506-508 (1986). That deference extends to challenges to the system of military justice. See *Solorio* v. *United States*, 483 U.S. 435, 447-448 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. * * * [W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated."); *Chappell* v. *Wallace*, 462 U.S. 296, 300-301 (1983) (noting the "need and justification for a special and exclusive system of military justice[.] * * * It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights,

duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."); *Schlesinger* v. *Councilman*, 420 U.S. 738, 753 (1975) (noting "the deference that should be accorded the judgments of the carefully designed military justice system"); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) ("The constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action.").

This is not to say that the Due Process Clause is inapplicable to the military justice system. See *Rostker*, 453 U.S. at 67. But due process does not demand that the military justice system mirror the civilian system, or that every feature deemed essential in the civilian system be found in the military justice system as well. Because petitioners have not demonstrated that the military justice system results in fundamental unfairness on account of the absence of judicial tenure, their due process claim fails to overcome the strong presumption in favor of the constitutionality of the system devised by Congress and implemented by the Executive to adjudicate criminal cases in the military. As this Court put the matter in an analogous setting in *Middendorf* v. *Henry*, 425 U.S. at 44, the Court need only decide whether the factors militating in favor of tenure for military judges "are so extraordinarily weighty as to overcome the balance struck by Congress."

A. A Due Process Violation In This Case Cannot Be Based On A Balancing Of The Perceived Costs And Benefits Of Judicial Tenure In The Military

1. Petitioners argue that their due process claim must be tested under the analytical framework

adopted in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Br. 28-36. *Mathews* involved the question whether due process guarantees a person receiving disability benefits an evidentiary hearing before his benefits can be terminated by an administrative agency. In answering that question, the Court formulated a three-part balancing test that focuses on (1) the private interest that would be affected by the decision; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved as well as the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 334-335. Petitioners' reliance on *Mathews*, however, is misplaced.

In *Medina* v. *California*, 112 S. Ct. 2572 (1992), this Court rejected a similar claim that the *Mathews* test should be applied to measure the validity of procedural rules that govern the criminal process. The defendant in *Medina* relied on the *Mathews* test in arguing that a California law placing on a defendant the burden of proving his incompetence to stand trial violated the Due Process Clause. This Court rejected both the defendant's specific claim and the assumption on which his argument rested. As the Court made clear, "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." *Id.* at 2576.

The Court in *Medina* stated that in the field of criminal law, "we have defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, [b]eyond the

specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." 112 S. Ct. at 2576 (internal quotation marks omitted). The Bill of Rights, the Court explained, "speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Ibid.* Thus, a rule or practice governing the criminal process violates principles of due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577.

Petitioners seek to limit *Medina* to its facts, contending that the *Medina* framework should be applied in "only those cases involving attempts to impose due process requirements through altering the burden of proof to favor the defendant." Br. 34. As the passages quoted above make clear, however, *Medina* cannot bear that reading. The opinion states that the correct analytical framework "includ[es]" issues such as "the burden of producing evidence and the burden of persuasion," 112 S. Ct. at 2577 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)); it does not suggest that its analysis is confined to such matters. Moreover, the Court has applied the same due process analysis to other issues of criminal procedure, not involving the allocation of the burden of proof. See *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (use of evidence of a prior acquittal); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (preindictment delay in filing charges); and *Snyder* v. *Massachusetts*, 291 U.S. 97, 104-105 (1934) (jurors'

visual examination of crime scene in defendant's absence); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975) (declining to apply this Court's decisions involving "the relatively recent application of variable procedural due process in * * * termination of government-created benefits" in a case that "deal[s] with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment"). Last Term, the Court applied the *Medina* framework in *Herrera* v. *Collins*, 113 S. Ct. 853, 864 (1993), which involved a due process challenge to a state time limit for filing motions for a new trial based on newly discovered evidence. It is thus clear that *Medina* sets forth the appropriate due process framework for criminal cases generally, and that it is not limited to rules dealing with the allocation of burdens of proof.

Nor is there any force to the argument of amicus Air Force Appellate Division, Br. 10, that the approach articulated in *Medina* was based on federalism concerns and should not be applied in cases involving the federal government. The Court in *Medina* relied on cases arising from the federal criminal justice system, such as *Dowling* and *Lovasco*, both of which articulated a similar approach for cases involving the federal government. Moreover, as the Court explained in *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-757 (1975), deference of the sort owed to the States in reviewing their criminal procedures is owed as well to the military in reviewing challenges to the system of military justice.

2. The problem of fashioning an appropriate remedy for what petitioners claim is a fundamental constitutional defect in the court-martial process demonstrates why the challenge they raise is better ad-

dressed to Congress than to the courts. Were this Court to hold that a military judge must have a fixed term of office, it would be necessary for the courts to fix a minimum term of office for those judges, or establish criteria to determine how terms will be fixed or when judges may be removed. Ultimately, the courts would have to ask what fixed term is sufficient: 15 years?, 5 years?, 6 months? While Congress has selected various terms for different officers, that determination is quintessentially legislative; for a court to determine the minimum acceptable term (and conditions) of tenure for a military judge would require the court to engage in a standardless line-drawing exercise. In making that decision, the court would need to consider the effect of its actions on the ability of the armed forces to carry out their mission, and whether there should be exceptions (as petitioners suggest) for proceedings held overseas, in wartime, during periods of force reduction, and perhaps in other settings. Those policy judgments are far better suited to the political branches, which have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14; Art. II, § 2, Cl. 1, and the duty to make whatever judgments are necessary to resolve those matters.

3. The political branches have not overlooked this issue; on the contrary, they considered it less than a decade ago. In 1984, Congress directed the Secretary of Defense to establish a commission to study and make recommendations regarding (among other things) whether military judges should have tenure. Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b), 97 Stat. 1404-1405, as amended by the Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, Tit. XV, § 1521, 98 Stat. 2628 (1984).

After holding hearings on this question, the commission recommended that military judges should not have tenure, for several reasons.

The commission determined that military judges enjoy independence within the military justice system; that military judges have the equivalent of tenure in the form of stable tours of duty; and that there were no reported instances in which a military judge was sought to be removed because of the content of his decisions. The commission also noted that job rotation and reassignment were indispensable for an officer to advance through the ranks in the military, because such a progression gave an officer experience in various aspects of the service. Assigning officers to positions as military judges for a long fixed period would be detrimental to their career advancement within the armed forces, which, in turn, could dissuade ambitious candidates from seeking duty as military judges, thereby weakening the bench in the military justice system. The commission concluded that the military's need to maintain assignment flexibility outweighed any benefit to military judges by granting them a fixed term of office. See 1 *The Military Justice Act of 1983, Advisory Commission Report, Commission Recommendations and Position Papers* 8-9 (1984).[15] Since receiving the Commission's report, Congress has amended the UCMJ by directing the President to adopt procedures for the investigation of charges concerning a military judge's fitness to carry out his judicial duties. Art. 6a, UCMJ, 10 U.S.C. 806a (Supp. IV 1992). In all other relevant respects, Congress and the President have

[15] The need for flexibility in the assignment of senior military personnel is also heightened by the reductions in personnel now underway in the services.

decided to keep the military judiciary where it stood in 1983. Accordingly, the absence of fixed terms for military judges is not an unexamined relic of our common law heritage, but reflects the contemporary and considered judgment of the political branches that judicial tenure is both unnecessary and unwise. This Court should not second-guess that judgment in the guise of applying a due process balancing test.

B. Neither The Constitutional Text Nor The Relevant Constitutional History Supports Petitioners' Claim That Military Judges Must Have Fixed Terms Of Office

1. The Constitution defines fixed terms of office for certain Officers of the United States. The President and Vice-President hold office for the same four-year term, Art. II, § 1, Cl. 1; Members of the House of Representatives hold office for two years, Art. I, § 2, Cl. 1; and Senators hold office for six years, Art. I, § 3, Cl. 1. "Judges" of the "supreme and inferior Courts" hold office "during good Behaviour," Art. III, § 1, but that provision does not apply to Article I judges, including judges in the military justice system. *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955) ("[T]he Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will."); see *Palmore* v. *United States*, 411 U.S. 389, 410 (1973) (due process does not require life tenure for Article I judges). Otherwise, the Constitution is silent about the term of office to be held by any member of the government.

The Constitution, of course, contemplates that there will be other "officers" of the federal government, see

Art. II, § 2, Cl. 1 (President may ask for the opinion of "the principal Officer in each of the executive Departments"); Art. II, § 2, Cl. 2 ("inferior Officers"), including officers of the armed forces; Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief of the Army and Navy."). But the Constitution does not fix a term of office for such positions. Rather, it leaves that matter to the political branches to define as need be, see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958); *Morrison* v. *Olson*, 487 U.S. 654 (1988), or it vests in the President as Chief Executive the authority to decide how long an officer should serve, see *Myers* v. *United States*, 272 U.S. 52 (1926). In short, the text of the Constitution manifests that the selection of judges in the military justice system "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline*, 458 U.S. at 66 (plurality opinion).

2. Petitioners argue that military judges must have a fixed term, because tenure is a fundamental component of the civilian judicial tradition. But that analogy is inapt. Underlying petitioners' argument is the concern that a judge will not run the risk of making an unpopular judgment if doing so will cost him his job. That risk is not present in the military justice system, at least not to the same degree. Reassignment to nonjudicial duties in the military does not entail expulsion from the service and loss of pay, rank, status, and retirement eligibility. Unlike their civilian counterparts, military judges do not risk becoming impoverished by making unpopular legal rulings. In addition, because it is standard procedure

for military judges to serve only a limited term, rather than make a career as a military judge, being transferred after serving a tour of duty as a judge in the military would not be seen as a demotion, nor would it harm an officer's career prospects within the service or in civilian life.

Equally important is that the military justice system historically has functioned quite differently from civilian criminal courts. Whether elected or appointed, civilian judges are participants in the political process, *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991); *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), so it is not surprising that they typically enjoy some form or degree of tenure. But that is not to say that judicial tenure is a necessary component of due process, particularly in the quite different military setting. The critical question is whether the absence of tenure of some undefined period for military judges results in the denial to servicemembers of a fair trial and fair consideration of their cases on appeal.

3. History proves that it does not. To read into the Constitution, at this late date, a requirement of fixed terms of office for military judges, "[o]ne must ignore history, tradition, and practice for [more than] two centuries." *Middendorf*, 425 U.S. at 50 (Powell, J., concurring). When viewed against the historical background, the assignment flexibility in the current court-martial system does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 112 S. Ct. at 2577.

Courts-martial in this nation have been conducted for more than 200 years without any kind of judicial tenure for the presiding officer. Yet if this long-

standing practice were as certain to lead to fundamentally unfair outcomes as petitioners claim, it is difficult to understand why this claim has been so slow in surfacing. The fact that the American court-martial system "has been practised for two hundred years by common consent" without judicial tenure is a powerful testament to its constitutional validity. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.).

English military tribunals served as the model for our own military justice system. Although military justice was initially the responsibility of the Court of Chivalry, the growth and geographic distribution of British military forces prompted the crown to authorize the formation of panels of officers, known as courts-martial, to adjudicate military cases. Those courts were convened by a general, who sat as the presiding judge or president; no tenured military judge controlled the proceedings. Schleuter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 136, 138-140 (1980).

In America, the Revolutionary War provoked the need for a written code of conduct to govern the soldiers of the new Continental Army, and the Continental Congress adopted Articles of War that were based largely on the British model. Under the Articles of War of 1775, a general court-martial consisting of officers was convened by a general officer (or an equivalent commander) and was empowered to inflict such punishment as it found appropriate, including death. No tenured judge presided over those tribunals. William Winthrop, *Military Law and Precedents* 21-22, 953-960 (2d ed. 1920) [hereinafter Winthrop].

Throughout the 19th century, court-martial proceedings were conducted without a judge's super-

vision. A "judge advocate" was typically assigned to the court-martial by the convening officer to act both as prosecutor and as counsel to the defendant. Art. 6 of Articles of War of 1786, *reprinted in* Winthrop 972; Art. 74 of Articles of War of 1874, *reprinted in* Winthrop 992.

In 1916, Congress created the three types of courts-martial that exist today and required a convening authority to appoint a judge advocate to general and special courts-martial. As under the prior regime, the judge advocate's primary role was that of prosecutor, but he was also to act as an advisor to the accused when the latter was not represented by counsel. Act of Aug. 29, 1916, ch. 418, § 3, Arts. 3, 11, 17, 39 Stat. 651, 652, 653. The president of a court-martial usually was not a lawyer, and as under prior practice the court-martial members voted on evidentiary and procedural motions. Art. 31, 39 Stat. 655; F. Gilligan & F. Lederer, *Court-Martial Procedure* 11 (1991).

In 1920, Congress formally designated a "law member" who would be detailed by the convening authority to general courts-martial in the Army. Act of June 4, 1920, ch. 227, ch. II, § 1, Art. 8, 41 Stat. 788. This officer had the power to rule on questions regarding the admission of evidence, but he could be overruled by a majority of the court-martial panel members on other such matters. Art. 31, 41 Stat. 793.[16] The law member participated in the court-

[16] As the Court of Military Appeals noted, "[u]ntil 1951, the Navy and Coast Guard continued the pre-1920 practice of using non-lawyers to preside over courts-martial and decide interlocutory questions." Pet. App. 10a (citing *Naval Courts and Boards* §§ 379, 381 (1937); U.S. Coast Guard, *Manual for Courts-Martial* ¶ 385(t), at 134 (1949)).

martial's deliberations and had an equal vote concerning the findings and the sentence. *Ibid.* Article 50½, 41 Stat. 797-799, also required the Judge Advocate General to designate "a board of review consisting of not less than three officers" of his department to review the sentences imposed by a general court-martial. Under Article 36, 41 Stat. 794, special and summary courts-martial continued to be reviewed only by the officer who had convened that court.[17]

Dissatisfaction with the operation of the military justice system during World War II ultimately led Congress to enact the Uniform Code of Military Justice, ch. 169, § 1, 64 Stat. 107 (1950) (codified at 50 U.S.C. 551-736 (Supp. IV 1950), recodified at 10 U.S.C. 801-940 (Supp. IV 1956)). Under Article 26 of the UCMJ, 64 Stat. 117, all general courts-martial required the presence of a "law officer" who was a member of the bar and was certified for such duty by the Judge Advocate General. The law officer was barred from deliberating and voting with the other members. Instead, he ruled on interlocutory questions and provided instructions to the court. Arts. 51(b) and (c), 64 Stat. 124-125. The president of the court-martial—who, once again, was usually not a lawyer—still had those responsibilities in special courts-martial. Article 66(a) of the UCMJ, 64 Stat. 128, also created boards of review for all the services constituted in the offices of the respective Judge Advocates General and "composed of not less than three officers or civilians, each of whom shall be

[17] A Board of Review was not established in the Navy. Instead, field commanders were entrusted with reviewing records of courts-martial convened by them or their subordinates. See *Naval Courts and Boards* § 472.

a member of the bar of a Federal court or of the highest court of a State of the United States." [18]

The Military Justice Act of 1968, Pub. L. No. 90-632, §§ 2(8), (9), 82 Stat. 1336, changed the title of "law officer" to that of "military judge" and more formally identified that officer as the presiding officer in courts-martial. Article 26(b) of the Code required a trial judge to be a commissioned officer, a member of a state or federal bar, and certified by the Judge Advocate General as qualified for that duty. 10 U.S.C. 826(b). Article 66(a) of the UCMJ, 10 U.S.C. 866(a), fixed similar requirements for military appellate judges, reflecting the fact that the Boards of Review functioned as appellate courts and the officers assigned to them as appellate judges. But the 1968 amendments did not provide for tenure either for officers assigned to serve as military trial judges or for those assigned to serve on the courts of military review.

In sum, for more than 200 years Congress has passed legislation for the operation of the military justice system without once providing any tenure for military officers performing judicial roles. Winthrop 179-204. That longstanding, consistent judgment by the branches responsible for governance of the nation's armed forces is entitled to considerable respect. See *Solorio*, 483 U.S. at 447.

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[18] Congress had earlier created a Board of Review for the Air Force in 1948. Act of June 25, 1948, ch. 648, 62 Stat. 1014.

C. The Use Of Fixed Terms Of Office For Military Judges Is Not Necessary To Ensure Independence And Impartiality

1. Petitioners and amici claim that due process requires that military judges have a fixed term of office in order to ensure that they are independent from their superiors and from the government in general. Otherwise, petitioners contend, there is too great a risk that military judges will favor the prosecution in order to avoid being transferred from that duty in the military justice system to other military duties, with a resulting injury to their professional careers. Petitioners concede that due process does not require life tenure, see *Palmore* v. *United States*, 411 U.S. at 410, but they argue that some term of office is necessary to ensure the fact and appearance of impartiality.

Petitioners' claim is, in effect, a claim of implied bias. This Court, however, has consistently refused to adopt a rule of implied bias in other, related contexts. For example, *Dennis* v. *United States*, 339 U.S. 162 (1950), involved a contempt conviction for the failure to appear before the House Un-American Activities Committee. The Court rejected the argument that the jury, composed primarily of employees of the United States, was inherently biased. Dennis argued that the employees, who were subject to an executive order providing for their discharge upon reasonable grounds to believe that they were disloyal to the government, would not risk being dismissed by voting for acquittal. The Court rejected that claim of implied bias, noting that the "way is open in every case to raise a contention of bias," *id.* at

168, and that Dennis had failed to show actual bias on the part of the jurors in his case, *id.* at 172:

> Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determination, the sense of responsibility and the individual integrity by which men judge men.

More recently, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court rejected the claim that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office at the time of the trial. The Court stated that the "safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge," while not infallible, adequately protect the right to an impartial jury. *Id.* at 217. See also *United States* v. *Wood*, 299 U.S. 123 (1936) (government employees are not inherently biased); *Frazier* v. *United States*, 335 U.S. 497 (1948) (a jury composed entirely of government employees, including one juror and the wife of another person employed by the department responsible for enforcing the Act in question, is not inherently biased).

Cases in which the Court has found implied bias involve situations in which the decisionmaker stood personally to profit from a decision in the government's favor. For example, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), involved the legality of a procedure by which the mayor's compensation depended on the

amount of the fines he collected as a judge. See also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822-824 (1986) (judge had a "very similar" lawsuit pending against a party to the case at the time of his decision); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (judge's salary depended in part on number of search warrants issued); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (state administrative board consisted of optometrists in private practice who heard charges filed against licensed optometrists who were competitors of the board members); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (procedure similar to the one in *Tumey*).[19] The procedure at issue here—the lack of a fixed term of office—is not remotely similar to the ones challenged in those cases.

2. Even if Congress were to provide a fairly short period of tenure, to be followed by consideration for reappointment, as petitioners suggest would be constitutionally sufficient, it is far from clear that it would solve the problem of bias about which petitioners complain. If a military judge with a temporary assignment is subject (or perceived to be subject) to pressure from military authorities to favor the prosecution, a judge with a short period of tenure (especially one whose period of tenure is about to expire) would be in the same position. Thus, if petitioners are correct that the absence of tenure leads to bias on the part of military judges, precisely the same claim could be made in the case of at least a

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[19] *In re Murchison*, 349 U.S. 133 (1955), is inapposite. The Court there held that it is unfair for the same person to serve as both a one-man grand jury and the trial judge in the same case. Military judges do not perform any such conflicting functions.

significant subclass of judges unless military judges were all made ineligible for reappointment. Even then, defendants could complain that the specter of unattractive assignments after a period of judicial tenure might adversely influence a military judge's impartiality. Because limited tenure provides, at most, only a limited answer to the complaint of bias that petitioners raise, it is clear that in any event it is to other guarantees against bias that the military justice system must look. We submit that those other guarantees are sufficient to satisfy any due process concerns, even absent a system of tenure for officers assigned to serve as military judges.

3. The UCMJ and the services' implementing regulations are carefully structured to ensure that military judges are independent and impartial.

First, military judges are subject to the *ABA Code of Judicial Conduct* Canon 1 (1972), which requires them to uphold the independence and integrity of their courts. *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328, 336 (C.M.A. 1988). Moreover, the system for selecting military judges ensures that only the most qualified and experienced officers are selected, and that they are selected after careful and objective screening, which protects against the risk of command influence in the selection process.

Each branch of the armed forces has adopted regulations to ensure that only the most qualified officers will be selected as judges. For instance, the Judge Advocate General of the Army assigns officers to serve as judges based on the recommendation of the Chief Trial Judge and the Chief of Personnel, Plans and Training Office. A trial judge must be a relatively senior officer with several years of experience

in military criminal law assignments, and he also must have completed various educational courses. As a result, a judge on the Army Court of Military Review, for example, is usually a colonel who has obtained experience as a trial judge. See JAGC Personnel and Activity Directory and Personnel Policies, Office of the Judge Advocate General, Department of the Army ¶ 7-1(a) (qualifications of trial judges), ¶ 7-4 (qualifications of appellate judges) (1992-1993); see also Army Regulation 27-10 (describing organization of Army trial judiciary). The other services have similar regulations.[20]

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[20] The Navy-Marine Corps trial judiciary operates as a separate naval activity under the command of the Judge Advocate General. Secretary of the Navy Instruction [SECNAVINST 5813.6C]; Judge Advocate General Instruction [JAGINST 5813.4E]. Nominees for assignment as judges are considered by a judicial screening board established by the Judge Advocate General to ensure that only qualified officers are appointed to the bench. The Air Force has no standing written procedure for the selection of military judges, but traditionally judges have been selected by the Judge Advocate General from nominees identified by a board composed of senior ranking officers of the Judge Advocate General's Department. The Coast Guard has five judges on the court of military review, all of whom were originally appointed by the General Counsel of the Department of Transportation in his capacity as the Judge Advocate General of the Coast Guard. As noted earlier, the Secretary of Transportation has adopted those appointments as his own. Only the Chief Judge of the court is a full-time judge; the other four have other primary duty responsibilities. See generally *Fiscal Year 1992 Annual Report of the Chief Counsel of the Coast Guard*. The Coast Guard has one full-time general court-martial judge and normally six to eight part-time special court-martial judges, all of whom are appointed by the General Counsel of the Department of Transportation. The officers appointed as special court-martial judges are also

Second, the UCMJ has removed military judges from the institutional control of military commanders. Under Article 26 of the UCMJ, 10 U.S.C. 826, a military trial judge is placed under the authority of the Judge Advocate General of each service, not under a court-martial convening authority. Article 26(a) of the Code, 10 U.S.C. 826(a), authorizes the Secretary of each service to issue regulations establishing the manner in which military judges are detailed to courts-martial. In the *Manual for Courts-Martial* the President has required that judges must be detailed to a court-martial by other individuals who are assigned to judicial duties. Rule for Courts-Martial 503(b)(1).

The UCMJ further provides that neither a military commander who has convened a court-martial nor his staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties. Art. 26(c), UCMJ, 10 U.S.C. 826(c). Similarly, no military appellate judge may prepare any report concerning the fitness, advancement in grade, assignment, or retention in the armed service of any other military appellate court judge. Art. 66(g), UCMJ, 10 U.S.C. 866(g).[21]

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assigned other primary duties and are detailed as needed to special courts-martial outside their jurisdictions. See generally *Coast Guard Military Justice Manual* [COMDTINST M5810.C].

[21] For example, the Circuit Military Judge of the Navy-Marine Corps Trial Judiciary is responsible for writing fitness reports on the other junior judges in the circuit. JAGINST 5813.4E; see generally Navy Military Personnel Command Instruction 1611.1A; Marine Corps Order [MCO]

Petitioners are mistaken in claiming that making military judges accountable to the Judge Advocates General weakens the judges' independence. Br. 45-49. That claim misapprehends the role of the Judge Advocates General in the military justice system. In the Military Justice Act of 1968, Congress protected the independence of military judges but also required that those officers, like all other military officers, be held accountable to someone for the performance of their duties. The balance Congress struck between independence and accountability was to place military judges under the direct control of the Judge Advocates General.[22] That legislative judgment concerning

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P1610.7 (detailing procedures for reporting on the fitness of officers). The Chief Judge of the Navy-Marine Corps Trial Judiciary, as the senior officer in the chain of command of the Circuit Military Judges, is authorized to write their fitness reports. *Ibid.* Finally, the Chief Judge of the Navy-Marine Corps Trial Judiciary and the judges of the Navy-Marine Corps Court of Military Review are evaluated by the Judge Advocate General. See *Office of the Judge Advocate General (OJAG) Organization Manual* [JAGINST 5400.1A] §§ 109-110.

[22] See S. Rep. No. 1601, 90th Cong., 2d Sess. 7 (1968): "The intent is to provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the Judge Advocate General of the service and are responsible only to him or his designees for direction and fitness ratings." The Navy-Marine Corps Court of Military Review recently rejected a challenge to the independence of the judges of that court based on the fact that the Judge Advocate General writes their fitness reports:

> [I]t is apparent that [the Judge Advocate General] is more than an administrative functionary in the military justice system—indeed, he is the linchpin that holds the system together and, most important, the key to its integ-

the operation of the armed forces, when viewed in light of the other measures contained in the UCMJ to preserve the independence of military judges, is worthy of the deference and respect traditionally paid by this Court to such matters. See, *e.g.*, *Middendorf*, 425 U.S. at 43-44.

Third, Congress has implemented other protections against command influence through the UCMJ. A military commander may not censure, admonish, or reprimand a court-martial or military judge, nor may he attempt to coerce or influence a court-martial or other military tribunal. Art. 37(a), UCMJ, 10 U.S.C. 837(a). See also Rule for Courts-Martial 104 (outlawing command influence). A convening authority who violates Article 37 is subject to criminal prosecution under Article 98 of the UCMJ, 10 U.S.C. 898.

Fourth, the UCMJ is designed to ensure judicial impartiality and to provide an avenue for relief when the question of impartiality arises in particular cases. Articles 26 and 66(h) of the UCMJ, 10 U.S.C. 826, 866(h), provide that a military trial judge may not preside over a case in which he has an interest or in which he has previously participated. And a military judge may be challenged for cause whenever his im-

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rity. Congress, as well as the Secretary [of the Navy] in the exercise of his statutory authority, has bestowed considerable trust and confidence in the JAG to ensure that the system works as designed: fairly, effectively, and in accordance with the law. * * *

With regard to his supervision of military judges in particular, the JAG is duty-bound to preserve their independence if he is to remain true to the congressional intent behind the Military Justice Act of 1968.

United States v. *Mitchell*, No. 92-1933 (N.M.C.C.M.R. May 24, 1993) (en banc), slip op. 10.

partiality may reasonably be questioned. Rule for Courts-Martial 902.

Finally, Congress has placed the Court of Military Appeals atop the military justice system in part to police the military justice system against any incursions on the independence and impartiality of military judges. The Court of Military Appeals is composed of tenured civilian judges who are not responsible in any respect to military commanders. See *Schlesinger* v. *Councilman*, 420 U.S. at 758 (the Court of Military Appeals is "completely removed from all military influence or persuasion," quoting H.R. Rep. No. 491, 81st Cong., 1st Sess. 7 (1949)). That court can check any efforts to influence a court-martial, and historically the Court of Military Appeals has been vigilant in rebuffing improper attempts to influence military judges.[23] Moreover, that authority is not merely hypothetical. That court has made clear that its decisions prohibit any exercise of improper influence over military judges, including adverse removal

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[23] See, *e.g.*, *United States* v. *Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (court barred official inquiries outside of the adversary process which questioned a military judge's sentence); *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328 (C.M.A. 1988) (court appointed one of its associate judges as a special master to oversee a Department of Defense investigation of the Navy-Marine Corps Court of Military Review concerning a controversial appellate decision); *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991) (court found that criticism of a Navy trial judge concerning his alleged lenient sentences by the chief of the Navy trial judiciary constituted improper command influence); *United States* v. *Allen*, 33 M.J. 209 (C.M.A. 1991) (court disapproved of a senior Navy lawyer's comment to the chief of the Navy trial judiciary that a certain military judge gave unduly lenient sentences).

actions against military judges as a result of their judicial acts. *United States* v. *Graf*, 35 M.J. at 465.

In sum, the military justice system has ample safeguards to ensure the impartiality and independence of military judges. Due process therefore does not also require that, in order to avoid fundamental unfairness to defendants, all military judges must be granted some kind of tenure in office.

CONCLUSION

The judgment of the Court of Military Appeals should be affirmed.

Respectfully submitted.

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